

Taylor Hospital and Pennsylvania Nurses Association, PNA Local 723. Case 4-CA-22400

June 27, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On March 15, 1995, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board had considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Taylor Hospital, Ridley Park, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mark E. Arbesfeld, Esq., for the General Counsel.

Lawrence B. Fine, Esq. (Morgan, Lewis & Bockius), of Philadelphia, Pennsylvania, for the Respondent.

Jamie Zurasky, Esq., of Fort Washington, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This proceeding was tried before me on September 20, 1994, in Philadelphia, Pennsylvania. The charge was filed on January 27, 1994,¹ and amended on March 28, 1994, by Pennsylvania Nurses Association, PNA Local 723 (the Union). The complaint issued March 31, 1994, alleging that Taylor Hospital (the Respondent or the Hospital) violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to furnish the Union with "budgetary information" and copies of census and reimbursement records, information necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the unit of employees it represents. Respondent, in its answer, denies the commission of any unfair labor practices.

All parties appeared at the hearing and were afforded full opportunity to be heard and present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record,² my observation of the demeanor of the wit-

¹ The General Counsel's motion to correct formal papers is granted.

² The General Counsel's motion to correct transcript is granted.

nesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT³

Taylor Hospital is a not-for-profit community hospital located in Ridley Park, Pennsylvania. Registered nurses at the hospital are represented by the Union and number about 100. They have been so represented since 1977, the most recent collective-bargaining agreement being effective from June 1, 1992, to May 31, 1994. The parties have agreed to an extension of this agreement and it was in force at the time of the hearing.

Meredith Neely is the senior vice president of human resources and administrative services. Her responsibilities lie within the collective-bargaining relationship between the PNA and Respondent, and include contract negotiation and interpretation and the arranging and holding of third-step grievance meetings.

According to Neely, in 1993⁴ the subject of health care reform was being discussed throughout the country. The drive toward health care reform put a great deal of pressure on hospitals to change their operations to conform to the requirements resulting from these pressures.

On November 4, Neely met with representatives of the Union to discuss the demand for health care reform, its effect on the hospital, what had already been done, and what might be done about it in the future. In attendance were officers of both the Respondent and the Union. Although the date for the meeting had been scheduled in advance, the Union had not been advised as to its purpose and its officers were caught off guard by the announcements made at the meeting.

At the meeting, Neely advised the union officers that insurers were tightening up their requirements and lowering reimbursements, that they were now questioning and denying hospitalization, and whereas they had previously agreed to the admittance of new patients, they were now looking for alternative ways of treating them. Certain procedures that had been done on an in-patient basis were now being done on an out-patient basis; procedures that had been done on an out-patient basis were now being done in doctors' offices.

Neely explained how insurers had changed their method of payments. Whereas, at one time the insurers would pay a percentage of charges, they were now paying the way Medicare pays, by diagnosis or paying on a per diem rate, with the result that reimbursements were declining.

Neely told those present that the various pressures from the insurance companies had resulted in a declining census⁵ in hospitals—fewer admissions and shorter lengths of stay⁶ and that the resulting changes, in turn, had impacted on the hospital's environment. In other words, it was taking in less money.

Aware that something had to be done, Neely explained, a steering committee was formed to look into ways of redesigning methods of providing health care in the hospital

³ Based on admissions in the pleadings, I find that the Board has jurisdiction and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

⁴ Hereinafter, all dates are in 1993 unless noted otherwise.

⁵ Census was defined by Neely simply as the number of patients in the hospital on any given day.

⁶ The declining length of stay impacts the number of beds needed and was therefore a factor in the decision to lay off.

which would permit Respondent to continue to meet its budget and remain financially healthy.

The committee, according to Neely, came up with a suggestion that the problems facing the hospital could best be solved by changing the skill mix in the hospital, by having registered nurses perform only those more demanding tasks for which they had been awarded their title, leaving the less demanding tasks, previously done in part by them, to less highly trained individuals who would be paid less than registered nurses. Neely then offered some examples of how units could be closed or combined with other units in such a way as to implement the committee's plan.

Finally, after providing the Union's officials with the above information, Neely advised them of the expected impact on their membership. She told them that she estimated that between 20 and 25 employees would be affected. Some would be laid off, to be replaced by unlicensed personnel and LPNs, but the situation might also be ameliorated through attrition.

Neely pointed out that Respondent had never before used the layoff provisions of the contract before and so wished to discuss with the Union the procedure to be followed. The parties did not, however, discuss the layoff procedure at length at this meeting.

Neely credibly testified that although she made reference to projected statistics for use in formulating a budget, such as the number of admissions and the length of patients' stay, she did not, at any time, indicate that the hospital was experiencing financial hardship. On the contrary, she was clear in her representation that the hospital was financially sound and that it was management's obligation to take steps to ensure that it remain in that condition.

Neely's description of what was said at the November 4 meeting was not seriously challenged by the General Counsel's sole witness, Barbara Loughrue,⁷ the Union's president, who was in attendance at the meeting. Some skepticism was voiced by Loughrue as the meeting broke up, however, when she asked Neely if she could give any assurances that the hospital was taking the action it was because it had to be done, rather than because it simply wanted to make more money.

On November 8, Loughrue met with Lisa Holgash, the Union's labor representative, who had been out of town and had not attended the November 4 meeting. Loughrue informed Holgash about the content of Neely's address at the November 4 meeting and about the impending layoff. They discussed what steps should be taken to avoid the layoff including making monetary concessions if, in fact, the hospital was in need of concessions. Holgash then told Loughrue that she was going to request financial information since Neely had told the Union on November 4 that the hospital intended to remain financially healthy. Loughrue testified that she had input into precisely what information would be requested and that she had discussed this subject with Holgash on November 8.

On November 8, Holgash sent the following letter to Neely:

Dear Meredith:

During the meeting with PNA Representatives Barbara Loughery, Elizabeth Pearsall, Janice Sara and Kathleen Duffy Hewes on Thursday, November 4, 1993, you referred to budgetary information. PNA Representatives requested a copy of the referenced material.

The PNA is again requesting a copy of any and all relevant information.

Very truly yours,

Lisa A. Holgash
Labor Representative

With regard to the specific text of the November 8 letter, Loughrue's "input" was clearly limited to identifying those who attended the November 4 meeting and possibly supplying the term "budgetary information." When examined at the hearing concerning this term, Loughrue testified, contrary to the letter, that the Union did not ask for "budgetary information" nor anything else at the November 4 meeting. She testified further that neither she nor anyone else from the Union ever explained to hospital management what was meant by the term "budgetary information" because no one ever asked her to explain it.

Loughrue testified that the term "budgetary information," as used in Holgash's November 4 letter, referred to what part of the budget was being allotted to nursing care prior to the contemplated changes, what part of the budget was going to be allotted to nursing care after the contemplated changes, where the savings derived from the contemplated changes were going to be spent and the amount of the expected savings. Loughrue denied that by the request for "budgetary information," the Union was requesting the hospital to open its books to the entire range of budgetary matters. According to Neely, when she received Holgash's November 8 letter, she did not know precisely what the reference to budgetary information might pertain. She testified that she assumed that it was a request that the hospital open its books to show the Union its financial situation.

Apparently Holgash and Loughrue spoke again after the November 8 letter had been sent, because on November 10 a followup letter was sent in which Holgash requested Neely to also send copies of the census and reimbursement records in addition to the information requested earlier. By "census" Holgash was referring to the number of in-patients in the hospital at a given time, a definition with which Neely was in agreement. By reimbursement records Holgash was referring to information concerning the care of those patients, whether it was being paid by an insurance company, by Medicare, or by Medicaid.

More particularly, with regard to census records, Holgash was seeking information regarding how many in-patients the hospital had been treating in the past, how many in-patients were being treated at the time, and how many in-patients the hospital projected for treatment in the future and the length of stay of patients already treated and under treatment. Since Neely, on November 4, had mentioned reducing the number of beds by 16, the Union was also interested in this subject. Although Holgash and Loughrue knew precisely what information they were seeking, the letter simply requested "census and reimbursement records," and nothing more.

⁷ Misspelled Loughery on most documents in evidence.

Loughrue testified that the Union requested the information sought in its letters of November 8 and 10 because Respondent had cited the low census and its desire to remain financially healthy as the reasons for the forthcoming changes in operations. The Union hoped that the information could help it in three ways. First, the information would be of value in determining whether or not grievances or potential grievances were meritorious. Second, it might enable the Union to offer a concessions package to the Respondent which, in turn, might enable some of the bargaining unit members to retain their jobs. Third, it might be advantageous in negotiating a severance package for the employees who would be laid off.

Neely testified that when she received Holgash's November 10 letter, she understood it to mean that the Union wanted information on Respondent's contractual agreements with insurance companies as to how they would be reimbursing the hospital. She explained that the relationship between the hospital and its insurance companies was by contract and that each contract contained a confidentiality clause which precluded her from divulging to the Union the information requested.

On November 12, Neely replied to Holgash's November 8 letter requesting "budgetary information." In it she stated, "as there is no contractual obligation to provide documents concerning the hospital's financial condition, nor has the Hospital asserted that it is in financial distress, there is no obligation to produce financial or budgetary information as requested." The letter invited further discussion if Holgash would pursue the matter.

On November 15, another meeting was held between Respondent and the Union. Both parties were represented by the same individuals who had attended the November 4 meeting except that Holgash joined the union contingent.

The meeting had been called to discuss the procedure to be followed in the forthcoming layoff of requested nurses. Neely noted that although the contract contained a layoff provision, the parties had never had the opportunity to work with it before so it was going to be a new experience. The parties then discussed the various ways of using the provision's language.

At some point during this meeting, Holgash asked Neely about the requested budgetary information because she had not yet received Neely's November 12 response. Neely mentioned that she had already answered that request by letter and that the answer had been no. She reiterated that the hospital was not having any financial difficulty and was not in any financial distress. She stated that since the hospital was not claiming financial reasons for its decision to lay off the nurses, it was not obligated to divulge to the Union, the budgetary information it had requested. She explained that due to pressures involving reimbursements and reform, the Respondent was just trying to ensure that it could maintain its financial viability on a prospective basis.

Despite Neely's statement of position, Holgash insisted that the Union was entitled to the information. At that point, another member of the management team advised her that she still was not going to get it. Holgash replied that the Union would file an unfair labor practice charge. After November 15, the Union made no further requests for information.

At no point during the discussion concerning the budgetary information did Respondent's representatives ask the Union's representative to clarify their reasons for requesting the information. Nor did the Union's representatives ever offer any explanation as to why they needed the information.

On November 16, Neely replied to Holgash's November 10 letter. She stated once again that at no time had she claimed that the hospital was experiencing financial hardship. Therefore, since there was no contractual obligation to provide documents concerning the hospital's financial condition, there was no obligation to produce financial, census, or reimbursement records as requested. Neely invited Holgash to contact her if she would like to discuss the matter further. Holgash did not reply nor did the Union.

Sometime after the meeting of November 15, Respondent undertook implementation of the new layoff and replacement policy which eventually resulted in the layoff of 26 unit employees. This gave rise to the filing of at least six grievances from November 16 through December 8. These grievances, however, all concerned the manner in which the hospital implemented the layoffs, according to Loughrue. The information requested by the Union was not the specific subject of any of the grievances but, she testified, was needed to determine whether or not to file additional grievances based on the information received and may or may not have been relevant to the grievances that were filed. The six grievances were taken to arbitration and were lost.

About November 17, the financial department of the Respondent and the Union were in contact discussing the number of layoffs, the bumping process, and who was involved. Despite this contact, the Union did not take the opportunity to clarify its information requests. The reason, according to Loughrue, was that the Union was not asked to clarify its information requests.

Conclusions

Condensation of the above findings of fact indicates that on November 4, Respondent's agent Neely advised the Union that due to pressures for reform within the industry, insurance reimbursements had dropped, and the number of patients and their length of stay had decreased. She explained that in order for the hospital to counteract the resulting decrease in revenues and remain financially healthy the number of available beds would be decreased and a number of registered nurses, all unit members, would be laid off and their places taken by less skilled personnel.

In order to protect the integrity of the unit and to determine if the purported reasons given for the layoffs were true, the Union asked for budgetary information and copies of census and reimbursement records. The budgetary information sought concerned the savings achieved by the hospital by laying off the registered nurses and replacing them with lower-paid less skilled employees while the census and reimbursement records would support or fail to support the reasons given by the hospital for the layoffs. With this information, the Union would be able to tell whether or not the Respondent was dealing with it in good faith and what steps it should take in response to the layoffs, if any. Without the requested information the Union had no way of determining what response it should make, whether grievances should be filed, concessions offered, or some other action taken.

A union is entitled to relevant information during the term of a collective-bargaining agreement to evaluate or process grievances and to perform other duties or take other actions necessary to administer the agreement.⁸ It is basic that a union must, of necessity, have a continuing interest in matters which will affect the tenure of employees it represents.⁹

In the instant case, Respondent gave the Union a very specific reason why it found it necessary to lay off 26 members of the unit and replace them with nonunion employees. It claimed it was necessary in order to permit Respondent to continue to meet its budget and remain financially healthy because of a diminishing census and declining reimbursements. If the Union were to accept Respondent's claim without requesting to see available verifying documentation, it would not be properly representing its members. I find that the Union is entitled to the information it requested because the information is both relevant and necessary for the Union to perform its representational duties.

Respondent offers several affirmative defenses. First, it maintains that the General Counsel has not established the relevancy of the requested information. In my view, Respondent itself established the relevancy of the information when it told the Union that there would be a layoff, that the purpose of the layoff was to meet its budget and remain financially healthy, and the reasons it was necessary was fewer patients and diminished reimbursements. That established the relevancy of the documentation which was the subject of the Union's request.

Second, Respondent argues that the Union is not entitled to the information requested because Respondent did not make a plea of poverty. The Union however has never requested that Respondent open its books, nor has it exhibited any interest in Respondent's overall financial position. That is irrelevant. The Union merely seeks information directly related to the economic layoff and the purported reasons for it. The Respondent cannot refuse any and all requests for information on the sole ground that it has not pled poverty.

Third, Respondent posits that it has no obligation to provide the requested documentation because the Union failed adequately to specify the information it was seeking and where a union makes only a "general request" for records or documentation and "fails to provide the employer with an explanation as to why it is seeking the information, and fails to identify the specific documents it is requesting, an employer is under no obligation to produce materials."¹⁰

The terminology used by the Union, however, in its requests of November 8 and 10 is virtually identical to the terminology used by Neely in her explanation to the Union during her speech of November 4 when she advised the Union's officials of the forthcoming layoff. When she referred to redesigning methods so as to permit Respondent to continue "to meet its budget and remain financially healthy," she knew what budgetary information had been used for this purpose. She also knew what she meant when she discussed census and reimbursement and what records were relied on in determining the necessity for the layoff. The union offi-

cial did not. All they could do is ask for "all relevant information," namely, budgetary information, census, and reimbursement records, which they did on November 8 and 10. If Neely did not understand that the Union was asking for whatever she was talking about on November 4, i.e., documentation to support the decision to lay off the nurses, then it was her duty to inquire, not to simply reject the request out of hand.¹¹ This she did not do.

Finally, Respondent claims that much of the requested information is highly confidential and therefore not subject to disclosure to the Union without a specific finding of relevancy. Relevancy however, I have already found to be obvious, and as stated in *Pennsylvania Power Co.*:¹²

It is clear . . . that in dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.

In the instant case, Respondent merely announced that certain information was confidential and made no attempt to accommodate the Union and its request for information. It therefore failed to bargain in good faith as required by the Act.

In conclusion, I find that Respondent has failed and refused to furnish the Union with budgetary information and census and reimbursement records, relevant information requested by the Union which is necessary for it to fulfill its statutory duties and responsibilities as the employees' collective-bargaining representative. By doing so, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act, consists of:

All full-time and regular part-time registered and graduate nurses in the employ of respondent, excluding any other employees such as nurses in the Supply Process and Distribution Section, or supervisors such as Head Nurses, as defined in the Act.

⁸ *Postal Service*, 307 NLRB 429 (1992), citing *Electrical Workers IUE v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980), and *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958).

⁹ *Western Massachusetts Electric Co.*, 234 NLRB 118 (1978).

¹⁰ Citing *AMF Bowling Co. v. NLRB*, 977 F.2d 141 (4th Cir. 1992).

¹¹ *National Electrical Contractors Assn., Birmingham Chapter*, 313 NLRB 770 (1994); *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

¹² 301 NLRB 1104 (1991).

4. At all times material, the Union has been and continues to be the exclusive representative of the employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to furnish the Union with budgetary information and census and reimbursement records, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act including action to make available to the Union the budgetary information and census and reimbursement records, which date is relevant and necessary to the Union's obligation to represent Respondent's employees in the appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Taylor Hospital, Ridley Park, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Pennsylvania Nurses Association, PNA Local 723, as the exclusive bargaining representative of its employees in the appropriate bargaining unit described in paragraph 3 of the Conclusions of Law section of this decision by refusing or failing to furnish the Union or its agents, on request, with data concerning budgetary information and census and reimbursement records or other relevant data and information necessary to the administration of its collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request furnish or make available to the appropriate agent of the Union the information described in paragraph 1(a) above.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its Ridley Park, Pennsylvania facility, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to furnish or make available to Pennsylvania Nurses Association, PNA Local 723 relevant data and information necessary to the policing and administration of our contract with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to the Union or its agents budgetary information and census and reimbursement records and other relevant data and information necessary to the administration of our collective-bargaining agreement with the Union.

TAYLOR HOSPITAL